Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of Qwest Corporation for	)	WC Docket No. 04-416
Forbearance Under 47 U.S.C. § 160(c)	)	
Pertaining to Qwest's xDSL Service	)	

OPPOSITION OF MCI, INC.

Kecia Boney Lewis
Alan Buzacott
1133 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 736-6270
kecia.b.lewis@mci.com

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OPPOSITION OF MCI, INC.

MCI, Inc. ("MCI") hereby submits its opposition to Qwest Corporation's ("Qwest") petition for forbearance.[1]

I. INTRODUCTION AND SUMMARY

MCI opposes Qwest's petition for forbearance from tariffing and rate averaging requirements, as well as the requirement that Qwest resell its xDSL service at an avoided cost discount.[2] In support of its Petition, Qwest provides only broad, unsubstantiated claims that fail to satisfy its burden of establishing a factual record demonstrating that the statutory criteria have been met. In the retail space, Qwest claims that end users have multiple alternatives to xDSL service. This is not true. While residential end users may have an alternative to xDSL service, at most, the only other viable option is cable modem service. Wireless, satellite and power lines are not full commercial entrants in most markets. On the wholesale side, independent information service providers ("ISPs") largely depend on the incumbent LECs' broadband transmission facilities to provide

[1] Petition of Qwest Corporation for Forbearance Under 47 U.S.C. § 160(c) Pertaining to Qwest's xDSL Service, WC Docket No. 04-416, (filed Nov. 10, 2004) ("Petition").

[2] On its face, the Petition purports to extend its forbearance request only to its "mass market xDSL service offered to end users." Petition at 5. MCI is confused by Qwest's use of this term. For purposes of this Opposition, MCI assumes that Qwest defines "end user" not to include ISPs.

high-speed broadband Internet access to their end user customers. Absent the protection provided by the tariffing and pricing requirements from which Qwest seeks forbearance, end users and independent ISPs will be susceptible to anticompetitive behavior by Qwest.

Determining whether incumbent LECs continue to possess market power in a given geographic market is a highly fact-specific inquiry. Qwest has not even attempted to show that marketplace forces in local markets would be adequate to constrain their market power and ensure that rates and practices are just, reasonable, and not unreasonably discriminatory. As a result, continued regulation of Qwest's xDSL service, both retail and wholesale, remains necessary to prevent Qwest from abusing its market power in the provision of retail and wholesale broadband services and to ensure just, reasonable, and nondiscriminatory rates.

II. QWEST RETAINS MARKET POWER IN THE BROADBAND TELECOMMUNICATIONS MARKET

As an initial matter, Qwest's claim that there is robust competition in the retail broadband market is erroneous.[3] While retail broadband customers in Qwest's territory *may* have an alternative to the incumbent LECs' xDSL services, Qwest has not presented any evidence demonstrating that this is true. At best, Qwest's Petition has shown that cable modem service is the main competitor to xDSL service. To support its claim, Qwest relies strongly on the general market share of cable modem service in the residential market to argue that competition is sufficient to constrain Qwest's rates.[4] But, try as it may, Qwest cannot point to the alternative services offered by wireless, satellite and energy companies to bolster its claim of significant intermodal competition. Broadband over power lines has yet to enter the market on a commercial basis. As for wireless and

[3] Petition at 13-17.
[4] *Id*. at 8-10, 13-15.

satellite broadband services, wireless and satellite providers are not significant players in the broadband market. Together, these entities comprise only 1.3% of the market.[5]

The Commission, therefore, cannot take comfort in BellSouth's claim that if it charges unjust and discriminatory rates, customers can turn to other providers. In reality, end users in Qwest's region, at most, may have a choice between xDSL service and cable modem service – if they reside in areas where both services are available.

Even if Qwest could demonstrate that cable modem service is prevalent throughout its territory as an alternative to xDSL, that would still not constitute a competitive retail broadband market. That would be a duopoly, in which Qwest would still maintain substantial market power. The Commission has consistently embraced the uniformly held view among economists that duopoly markets are insufficiently competitive because of the ever-present risk of tacit collusion: that the duopolists will recognize their shared economic interest with respect to price and output decisions and will act, albeit implicitly, so as to achieve supracompetitive profits.[6] For example, in reviewing proposed mergers among satellite television providers, the Commission recognized that a merger resulting in "duopoly," that is, "near-monopoly," "create[s] a

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[5] FCC High Speed Report, Dec. 2004, Tables 1-4.

[6] *See* Xavier Vives, *Oligopoly Pricing, Old Ideas and New Tools* at 6 (1999) (explaining tacit collusion theory); Edward Hastings Chamberlin, *The Theory of Monopolistic Competition: A Re-orientation of the Theory of Value* 46-55 (8th ed. 1962) (explaining that in a market with only two competitors, supracompetitive pricing at monopolistic levels is a danger). Also known as "spontaneous coordination," or "conscious parallelism," the concept of tacit collusion means that duopolists do not need to expressly collude in order to act so as to jointly attain supracompetitive profits. Rather, they have incentives to act interdependently. Gregory J. Werden, *Economic Evidence on the Existence of Collusion: Reconciling Antitrust Law With Oligopoly Theory,* Antitrust Law Journal 719, 726, 764 (2004) (internal citations omitted). Indeed, "from an economic point of view, explicit and tacit collusion are not fundamentally different," that is, they present the same problem of anti-competitive effects. Louis Philips, *Competition Policy: A Game Theoretic Perspective* 94 (1996).

strong presumption of significant anticompetitive effects."[7] The Commission reached similar conclusions about duopoly in the area of spectrum caps, stressing that a "duopoly cellular market" was "imperfectly competitive."[8]

The Commission's repeatedly expressed concerns about the dangers of duopoly are well grounded in economic theory. While a number of economic models of oligopolistic behaviors (of which duopoly is, of course, the most extreme example) exist, they coincide in teaching that anti-competitive outcomes increase as the number of firms in a market decreases, particularly in a duopoly situation.[9] This is because of the interdependence between firms built into duopoly: each firm realizes that its "own move has a considerable effect upon [its] competitors, and that this makes it idle to suppose that

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[7] *In the Matter of Application of EchoStar Communications Corporation*, *Hearing Designation Order*, 17 F.C.C.R. 20559, 20604-05, ¶¶ 99, 102 (2002) (hereinafter "*In the Matter of Echostar*").

[8] *In the Matter of Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, First Report & Order,* 11 F.C.C.R. 18455, 18470, ¶ 27 *(1996); see also In the Matter of Petitions for RuleMaking Concerning Proposed Changes to the Commission's Cellular Resale Policies, Notice of Proposed Rulemaking & Order*, 6 F.C.C.R. 1719, 1725, n. 67 (1991) ("We note at the outset that with respect to the current cellular market structure, the duopoly market structure was established in full recognition of the fact that only two carriers to a market was not ideal in terms of promoting competition."). Relatedly, the Commission has recognized that it is where a market has significantly more than two firms that competitive conditions may result. *See In the Matter of 2002 Biennial Regulatory Review -- Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Report and Order and Notice of Proposed Rulemaking*, 18 F.C.C.C. 13620, 13731, ¶ 289 (2002) ("[B]oth economic theory and empirical studies suggest that a market that has five or more relatively equally sized firms can achieve a level of market performance comparable to a fragmented, structurally competitive market.").

[9] *See, e.g.*, Vives, *Oligopoly Pricing* 301-322 (examining various game theory models of collusive behavior by duopolists and observing that both game theory and the empirical literature show that collusion breaks down as the number of firms involved increases); R. Selten, *A Simple Model of Imperfect Competition, where 4 are Few and 6 Are Many*, Int'l J. of Game Theory 141, 141 (1973) (explaining through game theory modeling that "a small group" of suppliers will "maximize [its] joint profits," and that in this context a "small group" is one containing four or fewer firms).

they will accept without retaliation the losses [it] forces upon them."[10] Price cuts by one firm, for example, can be expected to directly inflict losses on the only other firm in the market, by taking away customers from that firm, creating incentives for both firms to keep prices high.[11] The same is true for increases in production: an increase by one duopoly firm will directly and negatively impact the profits of the other, creating incentives to jointly keep output below what it would be at competitive levels.[12] With only two firms in the market, Qwest and the competing cable company, for example, they will be able to observe and react to each other's behavior with relative ease, providing them with classic duopolist incentives to act so as to maximize joint profits, to the great detriment of competition in the local telephone market.[13]

Morever, if there is little competition in the retail broadband market, the status of competition in the wholesale broadband market is even more restricted. As MCI

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[10] Jean Tirole, *The Theory of Industrial Organization* 240 (9th ed. 1997) (quoting Edward Chamberlin, *The Theory of Monopolistic Competition* (1933) (internal quotation marks omitted)).
[11] *See id.*
[12] *See* R. Blair & D. Kaserman, *Antitrust Economics* 193-200 (1985) (explaining, under Cournot, Stackelberg, and Chamberlian duopoly models, that duopolistic firms will tend to coordinate output to produce, collectively, less than the competitive level of output for the given market, and that a background assumption is that deviations from such behavior may be punished by the other firm increasing output); *see also* T. Hazlett, *The Wireless Craze, the Unlimited Bandwidth Myth*, 14 Harv. J.L. & Tech. 335, 517 (observing that incumbent cell-phone providers responded to the advent of PCS "by dramatically increasing their subscribership. Rates have not fallen due to decreased pressure to access cellular systems; those bands are used more intensively than ever. New cellular capacity has been 'found' via investments adding cell sites and base stations.").
[13] *See* J. Tirole, *Theory of Industrial Organization* 240-247 (explaining that numerous economic theorists have concluded that through interaction in the market, oligopolistic firms observe each others' conduct and learn that efforts to undermine supracompetitive pricing or output decisions may result in retaliation, giving incentives to collude tacitly); L. Philips, *Price Competition* 82 (noting that even under "imperfect information" about each other's pricing and output decisions, "[i]n . .. duopoly markets, significant," if "less than perfect . . . cooperation occurs, but, with an increase in the number of firms, it vanishes almost completely").

discussed in greater detail in response to BellSouth's forbearance petition,[14] the incumbent LEC's last-mile facilities are still the primary means for independent ISPs to access their customers. There are no third parties offering alternative narrowband or broadband transmission facilities.[15] Competitive LECs that provide underlying transmission facilities are in turn dependent upon incumbent LEC facilities. Cable modem systems are not a sufficient alternative because they are not generally required to open their networks to competing ISPs.

As long as carriers that own the broadband transmission facilities can exercise market power because transmission is not yet available on a competitive basis, they will exercise that market power by controlling downstream markets that depend on those transmission services. A firm like Qwest, that possesses market power over physical access to the network, has both the incentive and the ability to restrict competitors' access to end users, effectively preventing end users from enjoying applications or content from specific providers. Left unchecked, Qwest could provide an unfair advantage to its affiliated ISP by restricting the ability of non-affiliated ISPs to provide broadband Internet access to end users. The tariffing and pricing requirements at issue in this proceeding were intended to prevent this type of discriminatory and anticompetitive behavior.[16]

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[14] *See*, Opposition of MCI, Inc., WC 04-405 at 1-11 (filed Dec. 20, 2004).

[15] *Report and Order on Remand and Further Notice of Proposed Rulemaking, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, ¶ 233 (2003) (subsequent history omitted).

[16] *See e.g., MCI v. AT&T*, 512 U.S. 218 (1994) (holding that tariff requirements were intended as a critical means to prevent unreasonably discriminatory charges).

III. QWEST HAS FAILED TO MEET THE STANDARDS FOR ESTABLISHING FORBEARANCE UNDER SECTION 10

In order to satisfy the requirements for forbearance under section 10(a) of the Act, Qwest must demonstrate that Title II regulation of its retail broadband service: (1) is not necessary to ensure that the charges and practices for such services "are just and reasonable and are not unjustly or unreasonably discriminatory;" (2) is not necessary "for the protection of consumers;" and (3) is not necessary to protect the public interest.[17] The Commission must deny Qwest's Petition if it finds that "any one of the three prongs is unsatisfied."[18] In considering whether forbearance is consistent with the public interest, the Commission must focus on whether forbearance from Title II would promote competitive conditions in the marketplace.[19]

Other than to recite the general market share of cable modem service, Qwest fails to provide evidence supporting its Petition. Qwest does not demonstrate why continued enforcement of the tariffing and pricing requirements at issue is unnecessary and inconsistent with the public interest. Nor has Qwest shown that the requirements of sections 251 or 271 have been "fully implemented" as required by section 10(d).[20]

As the FCC has held, "the decision to forbear from enforcing statutes or regulations is not a simple decision, and must be based upon a record that contains more than broad, unsupported allegations of why the statutory criteria are met."[21] The

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[17] 47 U.S.C. § 160(a).

[18] *CTIA v. FCC*, 330 F.3d 502, 509 (D.C. Cir. 2003).

[19] 47 U.S.C. § 160(b).

[20] *Id*. § 160(d).

[21] *PCIA's Broadband PCS Alliance's Petition for Forbearance for Broadband Personal Communications Services*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 16857, ¶ 113 (1998).

Commission may grant forbearance only if it concludes that marketplace forces are sufficiently well-established to prevent unjust, unreasonable and unreasonably discriminatory practices, and to protect consumers. In particular, sections 10(a) and (b) focus on whether the statutory provision or regulation to be eliminated is needed to prevent a carrier from exercising market power by, for example, charging excessive rates or engaging in unlawful discrimination.

This reading of the statute is consistent with many years of FCC decisions, in which the Commission concluded that refraining from regulation is appropriate if and only if the carrier has no market power.[22] As explained above, dominant firms such as Qwest continue to exercise market power over last-mile facilities used to provide xDSL services, on both a retail and wholesale basis. Where a carrier possesses market power over bottleneck facilities or services, the Commission has either declined to grant forbearance, or conditioned forbearance on continued non-discriminatory access to those

[22] *See*, *e.g.*, *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended*, Second Report and Order, 11 FCC Rcd 20730, ¶ 21 (1996) (concluding that mandatory tariffing requirements for interexchange carriers that lacked market power were not necessary because marketplace forces would ensure that the rates and terms for interexchange services would be just and reasonable, and that consumers and the public interest would be protected); *Hyperion Telecommunications, Inc. Petition Requesting Forbearance*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 12 FCC Rcd 8596 (1997) (forbearing from applying tariffing requirements to non-dominant carriers for the provision of exchange access services based on a finding that, without market power, such carriers are unlikely to behave anti-competitively because doing so would likely result in a loss of customers); *2000 Biennial Regulatory Review; Policy and Rules Concerning the International, Interexchange Marketplace*, Report and Order, 16 FCC Rcd 10647 (2001) (relying on increased competition for international interexchange services to support detariffing of non-dominant carriers).

critical inputs.[23] The Commission has similarly declined to grant forbearance where it has determined that competition is insufficient to deter anti-competitive conduct.[24]

A. Qwest's Petition Fails to Make the Showing Required by Section 10(a)

Despite its claim that there is intermodal competition sufficient to ensure just and reasonable rates,[25] Qwest has not, and cannot, show that marketplace forces within its region would be adequate to constrain its market power and ensure that rates and practices are just, reasonable, and not unreasonably discriminatory; that consumers are protected; and that forbearance would be in the public interest. The tariffing and

[23] *Petition of U S WEST Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance*, Memorandum Opinion and Order, 14 FCC Rcd 16252, ¶¶ 35-37, (1999) (absent nondiscriminatory access to the BOCs directory assistance databases, none of the requirements of section 10(a) could be met); *BellSouth Petition for Forbearance for Nonlocal Directory Assistance Service; Petition of SBC Communications Inc. for Forbearance of Structural Separation Requirements and Request for Immediate Interim Relief in Relation to the Provision of Nonlocal Directory Assistance Services; Petition of Bell Atlantic for Further Forbearance from Section 272 Requirements in Connection with National Directory Assistance Services*, Memorandum Opinion and Order, 15 FCC Rcd 6053, ¶ 15 n.42 (2000); *see also Bell Operating Companies; Petitions for Forbearance from the Application of Section 272 of the Communications Act of 1934*, Memorandum Opinion and Order, 13 FCC Rcd 2627 (Com. Car. Bur. 1998) (conditioning forbearance on continued access by unaffiliated entities to listings used to provide E911 and reverse directory services). The FCC also declined to grant a petition requesting that it forbear from enforcing its depreciation accounting requirements, concluding that none of the three prongs of section 10(a) had been met because forbearance would likely raise prices for interconnection and UNEs. *See 1998 Biennial Regulatory Review – Review of Depreciation Requirements for Incumbent Local Exchange Carriers*, 15 FCC Rcd 242, ¶¶ 54, 63 (1999) (rejecting USTA's contention that the "thousands of interconnection agreements that incumbent LECs have negotiated with alternative providers of local exchange service, competition from wireless and personal communications services, and the freedom that cable companies and public utilities now have to enter telecommunications" were sufficient to constrain the incumbent LECs' ability to manipulate depreciation expenses).

[24] *See, e.g., COMSAT Corp. Petition Pursuant to Section 10(c) of the Communications Act of 1934, as amended, for Forbearance from Dominant Carrier Regulation and for Reclassification as a Non-Dominant Carrier*, 13 FCC Rcd 14083 (1998) (declining to grant forbearance from dominant carrier regulation where COMSAT would be free to increase its rates without losing customers because of a lack of competitive alternatives).

[25] Petition at 14-15.

discounted resale pricing requirements at issue are part of a regime of dominant carrier regulation designed to, among other things, promote a competitive retail and wholesale broadband marketplace. The importance of protecting ISPs from abuse by companies with market power is no less important today than when these requirements were first imposed.

In order to further promote competition in the wholesale xDSL transmission market, and thereby promote competition in the retail broadband market for end users, the Commission should maintain Qwest's tariffing and pricing obligations. In particular, the notice and cost support requirements provide incumbent LEC competitors the opportunity to analyze and challenge proposed incumbent LEC tariffs.[26] Competitive LECs, ISPs and other interested parties can petition the Commission to suspend and investigate tariffs that propose rates, terms and conditions that are viewed as unjust, unreasonable and/or, discriminatory in nature. Required cost support enables parties to examine the underlying justification for proposed rate changes. Absent this crucial information, both the Commission and interested parties would be severely hampered in their efforts to gauge the reasonableness of the incumbent LEC's proposal. Furthermore, Qwest requests that its tariff filings be "deemed lawful" on one-day's notice. If granted, the effect would be to foreclose not only the ability of parties to have an opportunity to view proposed tariff changes and cost support material, but it would also foreclose the ability of affected parties to obtain an award of damages in a formal complaint proceedings challenging the tariff. Not even nondominant carriers are afforded this type of forbearance.

[26] 47 C.F.R. §§ 61.58, 61.38.

Qwest's attempt to remove these protective, pro-competitive measures should speak volumes to the Commission. It is immaterial whether or not the ultimate end user customer is aware of the nuances of the tariff world.[27] Tariffing requirements ultimately protect consumers.

B. The Requirements of Sections 251(c) or 271 Have Not Been Fully Implemented, as Required by Section 10(d)

Even if Qwest had shown that it has satisfied section 10(a) (which it has not), section 10(d) of the Act bars the requested relief. Section 10(d) provides that the Commission may not forbear from applying the requirements of section 251(c) or 271 until it determines that those requirements have been "fully implemented." As MCI previously has explained,[28] the most reasonable construction of this requirement is that it is satisfied "when markets are deemed competitive."[29] Specifically, the Commission should not consider section 10(d) satisfied until it can conclude that in a relevant geographic area, a robust wholesale market exists that enables competing providers to obtain access to the telecommunications services and facilities they require to enter the market without the need for continued enforcement of section 251(c) or 271. Stated differently, the "fully implemented" standard requires a showing that a BOC no longer is dominant in the provision of the network elements and telecommunications services that entrants require to enter and compete effectively with the BOC.[30]

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[27] *See*, Petition at 18.
[28] *See* Opposition of MCI, WC Docket No. 03-157, at 27-28 (Aug. 18, 2003); Opposition of MCI, WC Docket No. 03-235, at 22 (Dec. 2, 2003).

[29] 141 Cong. Rec. S. 7942, 7956 (June 8, 1995) (statement of Senator McCain) (quoting from Heritage Foundation letter).

[30] *See, e.g.,* Z-Tel Reply Comments, CC Docket No. 01-338, at 118-23 (July 17, 2002) (citing *Motion of AT&T to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271 (1995)).

The fact that section 10(d) applies to both section 251(c) and section 271 reinforces this reading of "fully implemented." Both provisions focus on opening local telecommunications markets to entry through interconnection with an incumbent LEC, lease of unbundled network elements, or resale of retail services, or some combination thereof. In view of the paramount importance that Congress assigned to fostering the development of competitive local markets, the most reasonable reading of section 10(d) is to require the Commission to find that a robust wholesale market for facilities and services exists in a relevant geographic area so that it is assured that forbearing from enforcing the requirements of section 251(c) or section 271 will not lead promptly to the remonopolization of local and long distance services. And section 10(d) at a minimum requires Qwest to state with specificity the steps it has taken to fully implement each of the requirements from which it seeks forbearance.

Because dominant carriers such as Qwest continue to exercise market power over the last-mile facilities used to provide xDSL services, absent such a showing, the Commission must reject Qwest's Petition regarding forbearance from the requirements of sections 251(c) and 271.

CONCLUSION

For the foregoing reasons, MCI urges the Commission to deny Qwest's petition for forbearance.

Respectfully submitted,

MCI, Inc.

____________/s/__________

Kecia Boney Lewis
Alan Buzacott
1133 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 736-6270
kecia.b.lewis@mci.com

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